No. 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court for the Northern District of California, Southern Division

BRIEF ON BEHALF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, AMICUS CURIAE

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October 23, 1957

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AUTHORITIES

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PRELIMINARY STATEMENT

The National Association of Railroad and Utilities Commissioners, hereinafter referred to as the "Association", is a voluntary organization, the membership

of which embraces the members of the railroad and public utility regulatory commissions and boards of all the 48 States of the United States. By the Constitution of the Association its attorneys may be directed to appear on behalf of the Association (as distinguished from the individual commissions within its membership) in any proceeding pending before any court or commission in which it is felt that appearance on behalf of the Association should be made.

On July 26, 1956, the Association, in annual convention, duly adopted the following resolution

RESOLUTION IN SUPPORT OF FEDERAL AND STATE REGULATORY JURISDICTION OVER RATES CHARGED BY COMMON CARRIERS FOR TRANSPORTATION SERVICES RENDERED TO AGENCIES OF THE FEDERAL GOVERNMENT

Whereas, There is now before the National Congress H. R. 525 (the so-called Hinshaw Bill) a bill to repeal Section 22 of the Interstate Commerce Act which section now, in effect exempts from federal regulation rates on transportation performed for agencies of the Federal Government; and

Whereas, The provisions of Section 22 of the Interstate Commerce Act are made applicable to transportation by motor and water carriers and freight forwarders by reference in Parts 2, 3 and 4 of the Interstate Commerce Act; and

Whereas, The substantial and continuing abuse by agencies of the Federal Government of the provisions of this section of the Interstate Commerce Act has fostered unfair and destructive competitive practices among common carriers in violation of the specific terms, as well as the intent, of the National Transportation Policy; and

Whereas, It is the general feeling among shipping interests in all industries that it is wrong for the freight of the Government to be handled by common carrier transportation companies at less than the tariff rates charged other shippers under similar conditions; and

Whereas, The unwarranted lack of federal control over interstate transportation rates of common carriers when transporting for agencies of the Federal Government has fostered in such agencies an increasing disregard for the authority of the State regulatory bodies to such extent that such Government agencies are demanding from common carriers secret, sealed competitive bids for intrastate transportation in open violation of the rules and regulations of many State Commissions and the laws of those States; and

Whereas, Attempts by the individual States to preserve their rights to regulate intrastate transportation provided by common carriers to the Government agencies have resulted in the United States Department of Justice actively initiating or supporting or offering to support legal actions seeking to defeat State regulatory supervision of such transportation by such carriers; and

Whereas, Such legal proceedings have already in California and Texas resulted in decisions unfavorable to State regulatory authority; and

Whereas, The just and fair State regulation of common carriers providing service to the Government Agencies, including the Military Services, could have no bona-fide adverse effect on the national defense in peace time and could and would be overridden by proper Federal authority —without protest on the part of the States—in time of war or other national emergency; and

Whereas, Unified action of the States appears to be urgently needed to resist these unwarranted attempts to evade state authority;

Therefore Be It Resolved, That the National Association of Railroad and Utilities Commissioners supports the repeal of Section 22 of the Interstate Commerce Act (and related sections in Parts 2, 3 and 4 of such Act) as proposed in H. R. 525, providing however, such safeguards, if any, which may be necessary to guard against diversion of government traffic from regulated common carriers to unregulated carriers to the end that the movement of government traffic under secret, unknown and unpublished rates and charges will be discouraged; and

Be It Further Resolved, That the Association strongly opposes the actions of agencies of the Federal Government in advocating, promoting and supporting the evasion of state authority under the nebulous and wholly fictional claim of possible potential interference with the national defense; and

Be It Further Resolved, That the Association intervene in any proceeding before the Supreme Court involving the potential loss by a State of its regulatory powers in this field; and

Be It Further Resolved, That the attorneys for the Association be authorized to appear before the proper Congressional committees and otherwise to transmit to the Congress the intent of this Resolution.

This Association's interest in this proceeding is on behalf of the state commissions and boards represented in the membership of the Association, which agencies are charged by state laws with the duty of

regulating the intrastate rates and service of the railroads operating within their respective states.

STATEMENT OF THE CASE

In July, 1955, the Legislature of the State of California amended section 530 of the Public Utilities Code of the State of California. The amended section empowers the California Public Utilities Commission "to permit common carriers to transport property at reduced rates for the United States, state, county or municipal governments, to such extent and subject to such conditions as it may consider just and reasonable."

On December 2, 1955, the United States filed a complaint in the United States District Court for the Northern District of California, Southern Division, to have the Court declare section 530 of the Public Utilities Code unconstitutional and to enjoin the California Public Utilities Commission from taking any action under this section.

On June 5, 1956, the District Court ordered, adjudged and decreed:

> "1. Insofar as section 530 of the Public Utilities Code of the State of California purports to authorize the Public Utilities Commission of California to impose 'such conditions as it may consider just and reasonable' upon the granting of reduced rates by commercial carriers in favor of the United States, it is invalid, void and of no effect as contravening the provisions of article I, section 8, clauses 11, 12, 13, 16 and 17, and article IV, section 3, clause 2, of the Constitution of the United States.
>
> "2. Defendant Public Utilities Commission of the State of California and its agents and em-

ployees are hereby permanently enjoined from taking any action or issuing any orders which would interfere with the United States and the various carriers in the State of California from entering into special arrangements with respect to rates for the transportation of property of the United States." (141 F. Supp. 168)

The California Public Utilities Commission appeals, herein, that decision of the District Court.

STATEMENT OF POSITION

The Solicitor General of the United States and the Public Utilities Commission of the State of California have consented to the filing of this brief as amicus curiae pursuant to Rule 42 of the Revised Rules of the Supreme Court.

The National Association concurs in and endorses the position taken by the California Public Utilities Commission; namely, that:

The District Court did not have jurisdiction to entertain the complaint.

(1) The complaint did not allege or describe an actual controversy within the meaning of 28 U.S.C. Sec. 2201.

(2) The Plaintiff (Appellee) failed to exhaust the administrative remedy available to it in a proceeding before the Public Utilities Commission of the State of California.

(3) The complaint involved a matter which is within the primary jurisdiction of the Public Utilities Commission as an administrative agency of the State of California.

(4) The District Court was prohibited by the Johnson Act (28 U.S.C. Sec. 1342) from granting the relief requested by the Plaintiff (Appellee).

(5) The complaint did not allege facts showing irreparable injury to the Plaintiff (Appellee) in the absence of injunctive relief.

(6) The Plaintiff (Appellee) had an adequate remedy elsewhere than in the District Court.

(7) The District Court was required by law to abstain from granting the relief requested by the complaint in order to preserve comity in the relationship between the Government of the United States and that of the State of California.

However this brief is directed to what has been ermed the ultimate question—"Does the State of alifornia have the lawful power to regulate the ntrastate rates of carriers for the transportation of roperty of the United States between points in the tate of California and do the action and judgment f the District Court violate the Tenth Amendment to he Constitution of the United States?"

The National Association contends that a State can wfully regulate the rates for the intrastate trans- ortation of property for the United States.

ARGUMENT

State Regulation of the Rates for Intrastate Transportation of Property for the United States Is Not Unconstitutional

The District Court's opinion covers a history of the proceeding, an extended discussion of the testimony of the witnesses, and a response denying each of the preliminary questions raised by the California Public Utilities Commission, but fails to discuss the ultimate question other than to brush it off under the heading "Conclusion" with the statement, "We dare not, in good conscience and under the Constitution of the United States, deny relief to such a suitor when it proves to our satisfaction that such denial would hamper the national defense."

If this blankly-stated conclusion were true in fact and in law, this Association would not support for a minute the proposition of State regulation at the sacrifice of national defense. Rather, we feel that the statement exhibits a complete lack of understanding of the problem of intrastate rate regulation of Government transportation.

Under section 530 of the California Public Utilities Code, as is also the case under the statutes of most of the other states, carriers may transport property for the Government, at rates provided in their tariffs on file with the Commission and applicable to regular commercial shippers. The problem, in final analysis, becomes one of cost.

The Federal Government should have as great, if not greater, interest in preserving an adequate system of transportation and the National Transportation Policy as should commercial shippers. The practice of free or reduced rates for Government transporta-

tion has met with considerable dissatisfaction because of the evils and abuses which it has created. ("A Report to the President Prepared by the Presidential Advisory Committee on Transport Policy and Organization", April 1955; "A Report to Congress by the Commission on Organization of the Executive Branch of the Government", March, 1955; "Report on Transportation Prepared for the Commission on Organization of the Executive Branch of the Government by the Subcommittee on Transportation of the Committee on Business Organization for the Department of Defense", March, 1955; Hearings on H. R. 525 before the House Committee on Interstate and Foreign Commerce—84th Congress, September 19-22, 1955; Hearings on S. 939 before the Senate Committee on Interstate and Foreign Commerce—85th Congress; and Hearings on H. R. 3233 before the House Committee on Interstate and Foreign Commerce —85th Congress.)

The House Committee on Interstate and Foreign Commerce has stated:

> "The committee is convinced that common carriers should no longer be permitted to grant rate and fare concessions to the United States, State, or municipal governments. This practice is discriminatory, wasteful, and contrary to the public interest." (House Report No. 2633 to accompany H. R. 525—84th Congress, p. 4)

These ill effects of free or reduced rates for the transportation of property for the United States must be weighed against any cost effect.

As to the matter of cost itself, this Court has stated:

> "We are not advised of any statute in which Congress has undertaken to set aside state laws affecting the price of goods supplied to the government in order to secure a lower price than would otherwise be obtainable. And Congress has often required the inclusion in government contracts of terms not directly related to the interests of the government as a purchaser, which have the effect of increasing cost." *Penn Dairies* v. *Milk Control Com.*, 318 U. S. 261, 273.

Article I, Section 8, clauses 7, 12, 13, 16 and 17 of the Constitution of the United States empower Congress to establish post offices and post roads, to raise and support armies, to provide and maintain a navy, to provide for the militia, and to exercise exclusive legislation over the District of Columbia and certain Federal installations.

These clauses do not state that such instrumentalities will be provided at the lowest possible cost notwithstanding state laws. On the contrary, the Constitution creates and recognizes our dual form of government. These same clauses were the foundation of the United States' contention in the *Penn Dairies* case, supra, wherein this Court stated:

> "But there is no clause of the Constitution which purports, unaided by congressional enactment, to prohibit such regulations." p. 269

The Court stated further:

> "As in the case of state taxation of the seller, the government is affected only as the state's regulation may increase the price which the government must pay for milk. By the exercise

of control over the seller, the regulation imposes or may impose an increased economic burden on the government, for it may be assumed that the regulation if enforcible and enforced will increase the price of the milk purchased for consumption in Pennsylvania, unless the government is able to procure a supply from without the state, see Baldwin v. G. A. F. Seelig, Inc., 294 US 511, 79 L ed 1032, 55 S Ct 497, 101 ALR 55. But in this burden, if Congress has not acted to forbid it, we can find no different or greater impairment of federal authority than in the tax on sales to a government contractor sustained in Alabama v. King & Boozer, 314 US 1, 86 L ed 3, 62 S Ct 43, 140 ALR 615, supra; or the state regulation of the operations of a trucking company in performing its contract with the government to transport workers employed on a Public Works Administration project, upheld in Baltimore & A. R. Co. v. Lichtenberg, 176 Md 383, 4 A(2d) 734, supra; or the local building regulations applied to a contractor engaged in constructing a post-office building for the government, sustained in James Stewart & Co. v. Sadrakula, 309 US 94, 84 L ed 596, 60 S Ct 431, 127 ALR 821.

"The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in co-ordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy, and that state regulation, like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on citizens of the United States within the state's borders, see Metcalf & Eddy v.

Mitchell, supra (269 US 523, 524, 70 L ed 392, 393, 46 S Ct 172). And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to be implied from the Constitution which established the system, see Graves v. New York, 306 US 466, 483, 487, 83 L ed 927, 934, 937, 59 S Ct. 595, 120 ALR 1466."

Whatever immunity the Federal Government may have, it is obvious, does not extend to the common carriers who perform transportation services for the government.

In its recital of the testimony presented by the United States, the District Court reviews the logistic problem embraced in the military's world-wide operations, and the security problem. In *United States* v. *Pennsylvania P.U.C.*, Superior Court of Pennsylvania, No. 27, October Term, 1955, Decision dated September 30, 1957, the Pennsylvania Court gives a very logical and realistic answer to these allegations:

"'The United States contends, however, that the particular nature of this transportation indicates that state regulation of the rates imposes an unreasonable burden upon the Federal Government. It is argued that the lines of supply of the United States are highly integrated and synchronized to operate on a world-wide basis, and that any local interference with that system is improper. In the present case we are concerned only with shipments which originate and terminate within the Commonwealth of Pennsylvania without crossing state lines. It is purely an intrastate transportation. When considered in the over-all govern-

mental picture, it may have some relationship to the world-wide and national programs, but this fact alone does not make the obligation to pay established rates for transportation an unreasonable burden.

. . . . . .

". . . . the United States also contends that, since certain shipments of military material may be of a secret nature, the requirements of filing rates for shipment thereof with the commission may require revealing the nature of the shipment or its secret destination. In such instances the Federal Government would not be obliged to reveal to the commission any more information than it would ordinarily reveal to the carrier which is to transport the property. The regulation of rates for carriage does not require any breach of security or the extended dissemination of information which might lead to a breach of security."

There is nothing in the vague and general allegations of the United States to show how State regulation of the rates for intrastate transportation of property for the United States places an unreasonable burden and impediment on the power of Congress.

Nor has Congress attempted to set aside or prohibit State regulation of the rates for such transportation. The fact that section 22 of the Interstate Commerce Act, 49 U.S.C.A. 22, permits interstate shipments for the Federal Government to be handled free or at reduced rates does not indicate a congressional policy that intrastate shipments with respect to rates be free of local regulation. On the contrary, the Interstate Commerce Act recognizes State regulation of rail-

roads (sec. 1(17)(a)) and motor carriers (sec. 202(b)).

Neither the Armed Services Procurement Act of 1947 (41 U.S.C.A. Sec. 151-162) nor the Federal Property and Administrative Services Act of 1949 (40 U.S.C.A. Sec. 481(a)) change the congressional policy recognizing state regulation of transportation agencies. The former was under consideration in the *Penn Dairies* case, supra, wherein the Court stated that the Act did "not purport to set aside local price regulations."

The latter Act provides in section 481(a)(4):

> "With respect to transportation and other public utility services for the use of executive agencies, represent such agencies in negotiations with carriers and other public utilities and in proceedings involving carriers or other public utilities before Federal and State regulatory bodies; . . ."

And the Federal Government has appeared before the State regulatory commissions in numerous rate-making proceedings.

It has been the continued and established policy of Congress throughout these acts to recognize state regulation, and there is no indication that Congress has at any time implemented its constitutional powers in a manner designed to bypass state regulation of rates for intrastate shipments of property for the United States.

The judgment of the District Court below decreed that insofar as section 530 of the Public Utilities Code of California purports to authorize the California

Commission to impose "such conditions as it may consider just and reasonable" upon the granting of reduced rates for the intrastate transportation of property for the United States it is unconstitutional. Upon this premise, the Court enjoined the Commission from interfering with the United States and the carriers from entering into special arrangements with respect to rates for the transportation of property of the United States.

The injunction is much broader than the issues in the case. The injunction would cover non-military as well as military shipments. The injunction might be construed to cover not only shipments of military property for the United States but also shipments of household goods of Armed Forces personnel which are arranged for by the Government but are not property of the United States.

The ultimate question is one that is of substantial interest. The problem of state regulation of the rates for intrastate transportation of property for the United States has arisen in several states and is pressing in others. The question is presently under litigation in Texas and Pennsylvania and in the U. S. Court of Claims. And particularly as to the movement of household goods of government employees, it has become acute in other states.

The District Court found that there "is a constitutional difference between a can of milk and a hydrogen bomb." Yet the breadth of the injunctive relief granted by the District Court would cover the "can of milk" as well as the "hydrogen bomb", so the District Court fails to find the constitutional difference which it asserts exists. Its injunction covers not only "the

engines of war") but also non-military shipments, including, possibly, a can of milk for a sergeant's baby if included among some household goods being shipped from one military post to another.

CONCLUSION

It is respectfully submitted that the District Court was in error in adjudging that the California Public Utilities Commission does not have the power to regulate the rates for the intrastate transportation of the property for the United States; and in failing to follow the opinion of this Court in the *Penn Dairies* case. Accordingly, the judgment should be reversed.

Respectfully submitted,

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National Association of Railroad and Utilities Commissioners, amicus curiae

October 23, 1957

Certificate of Service

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing by first-class mail, postage prepaid, a copy thereof properly addressed to each such party.

Dated at Washington, D. C., this 23rd day of October, 1957.

AUSTIN L. ROBERTS, JR.